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In the Supreme Court of the United States

OCTOBER TERM, 1957

VICTOR H. FALL, one of the Presiding Judges of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, and BRUCE W. SANBORN, *Petitioners,*

vs.

ALEXANDER B. JOHNSTONE, *Respondent.*

Petition for Writ of Certiorari

TO THE SUPREME COURT OF MONTANA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Montana entered in the above cause on November 14, 1957, which became final on the denial of a timely petition for rehearing filed by the petitioner Fall, denied December 4, 1957, which judgment was rendered in an original proceeding seeking a writ of supervisory control or other appropriate writ. A peremptory writ of prohibition was issued on December 10, 1957, pursuant to an order issued on said date by the Supreme Court of Montana.

OPINION BELOW

The opinion of the Supreme Court is found in the Appendix p. 1-11, and not yet officially reported although it is found in the advance sheets of 319 Pac. Rep. (2d) 157.

JURISDICTION

The judgment of the Supreme Court of Montana became final on the denial of the petition for rehearing on December 4, 1957 (Department of Banking vs. Pink, 317 U.S. 264, 266), and the issuance of a writ of prohibition on December 10, 1957. (Appendix, p. 19-20). The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1257, Subdivision 3 in that the Court below in its opinion violated the provisions by taking of private property, without due process of law guaranteed by Subdivision 1 of the Fourteenth Amendment of the Constitution of the United States.

QUESTION PRESENTED

The opinion of the Supreme Court of Montana deprives the petitioner Sanborn of his real property, by not making him a party to the proceeding, without the issuance of any process or notice directed to him and without the service of any notice or process upon him and did not permit the reception of any evidence under the verified answer filed in the court raising issues of fact by denials of allegations in the application and pleading affirmative new matter.

STATEMENT

The respondent on March 2, 1957, filed his petition for a writ of supervisory control or other appropriate writ originally in the Supreme Court of the State of Montana. Thereafter the petitioner Fall, pursuant to an order to show cause issued on March 8, 1957, filed his duly verified return on March 18, 1957. Thereupon, the case was then heard on March 20, 1957, without requiring the relator therein to offer any proof in support of his petition and without affording the respondent therein any opportunity to offer evidence in support of the return.

Thereafter, on June 24, 1957, the Supreme Court rendered its opinion to which the respondent therein filed his petition for rehearing (Appendix, p. 12), which petition for rehearing was granted on July 22, 1957, and thereafter the proceedings were had as hereinabove set forth.

The petition for a writ filed in the Supreme Court of Montana sought to annul certain orders in the case of Sanborn vs. Johnstone in the District Court of the First Judicial District of the State of Montana. Therein the following proceedings had transpired:

The petitioner Sanborn had instituted an action in the District Court of the First Judicial District of the State of Montana to quiet title to real property, naming Johnstone as a party defendant and seeking to set aside a tax deed to Johnstone. This action was tried and a judgment rendered in the lower Court quieting the title in Johnstone, respondent herein.

An appeal was perfected to the Supreme Court of Montana and the judgment reversed, 113 Mont. 1, 120 Pac. (2d) 567. The Supreme Court of Montana required that the deposit in the sum of $1,213.41 to reimburse taxes paid, be delivered to Johnstone and made no further order. The remittitur in that case was filed on April 17, 1942, and an appropriate minute entry entered in the office of the Clerk of the District Court in conformity with the judgment of the Supreme Court pursuant to the provisions of Section 93-8025, Revised Codes of Montana, 1957. This was a final judgment, Woodard vs. Perkins, 119 Mont. 11, 171 Pac. (2d) 992, and vested the title in the lands in Sanborn. Therefater, on the 23rd day of May, 1944, the then Judge of the District Court of the First Judicial District of Montana, after the filing of the remittitur and without any notice to the petitioner Sanborn, proceeded to enter an order on the application of the respondent herein requiring the petitioner Sanborn to deposit $2,041.29 as additional taxes for the benefit of the respondent herein and gave the petitioner Sanborn the right to deposit such amount on or before June 20, 1944, otherwise a judgment would be entered quieting the title to the lands and premises in Johnstone, respondent herein.

That thereafter on June 8, 1944, the petitioner Sanborn filed a petition to vacate the order for a deposit of the additional funds in the sum of $2,041.29.

No further proceedings were had in the District Court of Lewis and Clark County until an amended petition was

filed January 11, 1957, seeking the vacation of the order for an additional deposit.

In the meantime, the respondent Johnstone had on November 23, 1954, filed a motion to dismiss the action. All of said motions and petitions came on for hearing before the petitioner Fall who, on the 11th day of January 1957, set aside the order of the District Court made on the 25th day of May, 1944, as being without jurisdiction. Thereupon proceedings were had in the Supreme Court of Montana as hereinabove set forth.

THE PROCEDURE

Under Montana law a writ of prohibition may be issued by the Supreme Court, Sec. 93-9202, R.C.M. 1947, and under Section 93-9204 R.C.M. 1947, and Section 93-9106, R.C.M., 1947, the respondent in such aproceeding may show cause by answer under oath which was done in this instance. A jury trial is contemplated if desired, as to questions of fact, Section 93-9107, R.C.M., 1947.

Issues of fact were raised by the answer to the petition (Appendix, p. 13-18).

THE PARTIES

In the Supreme Court the respondent herein was the relator, the District Court of the First Judicial District and Judge Fall were among the parties defendant. The petitioner Sanborn was not a party although affected by the final judgment of the Supreme Court. The petitioner

Sanborn here having the right to intervene is properly a petitioner in this proceeding. U. S. vs. Terminal R. Assoc. 236 U.S. 194, 199.

THE QUESTION OF DUE PROCESS WAS TIMELY RAISED

The question of due process was raised by the petition for rehearing to the first opinion of the Court (Appendix, p. 12) which was granted and discussed in the final opinion of the Court (Appendix, p. 13).

DUE PROCESS WAS DENIED

The Supreme Court of Montana attempted to adjudicate the rights of Sanborn in a case which had already been adjudicated without issuing any process or serving the same upon Sanborn and rendered a judgment affecting his rights in the absence of process or an appearance. Such a judgment is invalid. Clark vs. Wells, 203 U.S. 164, 170-171. No notice was given in any manner which was calculated to apprise Sanborn that his rights were to be adjudicated. Mullane v. Central Hanover B. & T. Co., 339 U.S. 306, 314.

The attempt of the Supreme Court to hold that the mere fact that the same counsel appeared in the proceeding in the District Court of the First Judicial District, likewise appeared for the respondent in the Supreme Court, is insufficient to be the equivalent of the service of process upon the petitioner Sanborn. Covey v. Town of Somers, 351 U.S. 141, 146.

The conduct of the Supreme Court of Montana after issues of fact were raised (Appendix, p. 13-18), in failing to hear testimony on such issues violates the fundamental principles of due process. Baltimore & Ohio Railroad Co. vs. U.S., 298 U.S. 349, 368-369.

CONCLUSION

It is clear that the due process clause of the Constitution was clearly violated in two respects:

(1) The Supreme Court of Montana attempted to adjudicate rights without any semblance of process, and

(2) failed to receive testimony upon questions of fact put in issue by the pleadings.

For the foregoing reasons, we respectfully submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION BELOW

No. 9792

STATE OF MONTANA ex. rel.,
ALEXANDER B. JOHNSTONE,
Relator,

vs.

DISTRICT COURT, LEWIS & CLARK COUNTY, et. al., *Respondents*

Submitted: Sept. 10, 1957
Decided: Nov. 14, 1957

Mr. Justice Angstman delivered the Opinion of the Court.

Relator seeks an appropriate writ to annul certain orders made by respondent court on January 11, 1957, and to prohibit respondents from further proceeding in district court cause No. 16386 except to enter judgment quieting title in favor of relator or to dismiss the action.

This court issued an order to show cause. On the return day, respondents filed a return and the matter was heard by this court.

The controversy arises out of proceedings in respondent court arising subsequent to the decision of this court in Sanborn v. Lewis & Clark County, 113 Mont. 1, 120 Pac. (2d) 567, being an action questioning tax title proceedings.

The petition shows that after the decision in that case, which was decided on October 2, 1941, and the rehearing denied January 3, 1942, the respondent court, the Hon-

orable Antone J. Horsky presiding, entered an order on May 25, 1944, in conformity with this court's opinion requiring Sanborn to pay to Johnstone the sum of $1,213.41 theretofore deposited in respondent court for taxes, purchase price payments and improvements made by Johnstone before the trial of the action in respondent court and in addition the sum of $2,041.29, being additional taxes and payments made by Johnstone to the county after the case was tried in respondent court and before the order was made.

That order recited that "if said plaintiff shall refuse and does not deposit said sum with the Clerk of the Court by June 20, 1944, this Court will enter judgment in accordance with the above-mentioned section [being 2214, Rev. Codes of 1935, now R.C.M. 1947, §84-4158] quieting title in the defendant, Alexander B. Johnstone and against the plaintiff and will thereupon order the return of the present and existing deposit of $1,213.41 to be paid by the Clerk of the Court to said plaintiff, provided further that if said plaintiff deposits the sum of $2,041.29 with the Clerk of the Court by June 20, 1944, then this Court will enter judgment quieting title in the plaintiff, Bruce W. Sanborn and will order the original deposit of $1,213.41 plus the current deposit of $2,041.29, making a total of $3,254.70 to be paid to the defendant, Alexander B. Johnstone as provided by Section 2214."

On June 8, 1944, Sanborn filed a motion to vacate and set aside the order of Judge Horsky upon the ground that it was made without notice to Sanborn or opportunity for a hearing and that it made no allowance to Sanborn for reasonable rental during the pendency of the action.

So far as the record shows there was no order made

or applied for extending the time for the payments to be made "by June 20, 1944."

This motion to set aside the order of Judge Horsky was not brought on for hearing until January 11, 1957. When it was brought on for hearing Johnstone filed a motion to dismiss the cause for failure of Sanborn to comply with Judge Horsky's order of May 25, 1944, and for laches in prosecuting the cause. This motion was overruled and Sanborn's motion to set aside the order of Judge Horsky was sustained and Sanborn was directed to prepare and file a petition or claim for rentals and other offsets that he might claim to be owing him from Johnstone as against Johnstone's claim under R.C.M. 1947, §84-4158.

Sanborn thereafter filed a petition for rentals which respondent court threatens to hear and consider. This petition claims rental of $500 per year, and a cost item of $211.41 which cost item was not objected to by Johnstone.

Relator questions the propriety of the order made by Judge Fall denying relator's motion to dismiss cause No. 16386, the order vacating the order of Judge Horsky and the order allowing Sanborn the privilege of filing a petition for rentals and other offsets.

The respondents in this proceeding have filed a return and answer to relator's petition. They contend that it raises questions of fact which must be resolved before the legal questions can be considered. Relator takes the view that no material fact questions are presented and that the legal questions are solvable on the record as made and on the uncontroverted facts. We agree with relator on this point.

The proceeding questions the right of Judge Fall to

set aside Judge Horsky's order and to deny Johnstone's motion to dismiss the action.

Judge Horsky made the order pursuant to the mandate of this court. It ordered the deposit of $1,213.41, which deposit was upheld by this court, to be paid to Johnstone and then provided for an additional payment of $2,041.29, which the order recited was for the following purposes: $856.65 subsequent taxes and $1,182.64 subsequent payments made by Johnstone to the county on the contract of purchase.

R.C.M. 1947, §84-4158, expressly authorizes the court to require the deposit of such additional taxes. It provides in part: "In the final judgment the court shall also determine the rights growing out of any additional taxes on said property accruing or being paid by either party during the pendency of said suit and, in said suit, the court shall have complete jurisdiction to fix the amount of taxes which should have been paid and to determine all questions necessary in granting full relief, including the power, in appropriate cases to order any assessor or other tax officer to make and certify to the court a corrected or new assessment or to do any other act or thing necessary to enable the court to do complete justice in the premises. Errors may be reviewed on appeal from the final judgment."

This court has expressly held that the purchaser from the county is entitled to have the order requiring a deposit to include all installment payments made to the county on the purchase price. Shull v. Lewis & Clark County, 92 Mont. 408-420, 19 Pac. (2d) 901, and see Larson v. Peppard, 38 Mont. 128, 99 Pac. 136, 129 Am. St. Rep. 630. Counsel for Sanborn do not question the right to add these amounts but assert that they may not be added without the right to offset rents, without notice to Sanborn,

which they allege was not given. It is questionable whether the want of notice would invalidate the order in its entirety, where as here part of it was valid and in conformity with the opinion of this court, and where as to some of the other items they were easily ascertainable or a matter of record and no showing was made that they were erroneous or that a different result would, should or could have been reached had notice been given.

Whatever may be the rule in that regard it is our view that the court acted without power and authority in setting aside the order of Judge Horsky some 12 years after the order was made, and in the face of a pending motion to dismiss the action for laches in its prosecution.

It has long been recognized that the courts have authority to dismiss an action for lack of diligence in its prosecution. State Savings Bank v. Albertson, 39 Mont. 414, 102 P. 692. This is the rule throughout the country. 27 C.J.S., Dismissal and Nonsuit, §65, p. 230; 30 C.J.S., Equity, §115, p. 530.

Here the motion of Sanborn to set aside the order of Judge Horsky was not brought on for hearing until after the lapse of more than 12 years after it was filed. Courts have held a plaintiff guilty of laches in failing to prosecute his action with a reasonable diligence on much shorter delay than that here. A few of the many cases so holding are the following: Raine v. Ennor, 39 Nev. 365, 158 P. 133 (nine years); Phillips v. Santa Ana Times, 18 Cal. App. 2d 280, 63 P. 2d 838 (three years); Congdon v. Aumiller, 79 Wash. 616, 140 P. 912 (seven years); Beaudette v. City (Tex. Civ. App.), 247 S.W. 895 (eight years); Lowe v. Ring, 151 Wis. 664, 139 N.W. 429 (five years); McGurren v. Noyes Bros. & Cutler, 65 N.D. 146, 256 N.W. 649 (five years); Hurley v. Farnsworth, 115 Me. 321, 93A.

821 (five years); Wilensky v. Philadelphia Casualty Co., 131 N.Y.S. 549 (less than seven years).

It is contended that if Sanborn was guilty of laches so was Johnstone. This contention is without merit for the courts hold that while defendant has the right to call a motion of plaintiff on for hearing it is not his obligation to do so, but the obligation to prosecute the action with diligence rests with the plaintiff. Thus in Congdon v. Aumiller, supra, the court said: "It seems consonant with reason that a plaintiff who hales a defendant into court assumes and, so long as he has the affirmative of the main issue, retains the duty of diligent prosecution. Neff v. Neff, 32 Wash. 82, 72 P. 1011; Arthur v. Washington Water Power Co., 42 Wash. 431, 85 P. 28; Rehmke v. Fogarty, 57 Wash. 412, 107 P. 184. As said by the Supreme Court of California in a case also closely analogous to this:

" 'But it is said that it was not the duty of the appellants to have urged the hearing of the demurrer; that this should have been done by the respondents, who filed it; and hence that the court was wrong in assuming that the laches of the appellants justified a dismissal of the action. The appellants brought the action; it would seem that upon them rested the burden of prosecuting it to a finality, and that as a step in that direction, from the facts then appearing to the court, they should have taken measures to have the demurrers determined, so that the action could progress'." A number of cases are then cited to support the statement.

In Hayward Lumber & Investment Co. v. Greenwalt, 215 Cal. 655, 12 Pac. (2d) 445, the court in treating of a like contention said: "The fact that certain demurrers to the complaint remained undisposed of does not suggest a different conclusion. It is well settled that 'while a defend-

ant may bring about a trial of the issue presented by his demurrer, is is the duty of the plaintiff to take measures to have the demurrer determined. It is incumbent upon plaintiff to use due diligence in this respect and failure to do so is ground for dismissal of the action.' Mowry v. Weisenhorn, 137 Cal. 110, 69 P. 971; Prudential Ins. Co. v. Superior Court, 117 Cal. App. 528, 4 Pac. (2d) 294; 21 Cal. Jur., p. 115, §74."

In Washington, dismissal for want of prosecution was provided for by rule of court and in State ex rel. Washington Water Power Co. v. Superior Court, 41 Wash. 2d 484, 250 Pac. (2d) 536, the court said: "The obligation of going forward to escape the operation of the rule always belongs to the plaintiff (or cross-complainant) and not to the defendant."

In Emmco Ins. Co. v. Walker, 57 N.M. 525, 260 Pac. (2d) 712, the court said: "The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination. * * *"

To the same effect are United States v. Pacific Fruit & Produce Co., 138 Fed. 2d 367, and Inderbitzen v. Lane Hospital, 17 Cal. App. 2d 003, 61 Pac. (2d) 514.

In Price v. Sunfield, 57 Ariz. 142, 112 Pac. (2d) 210, the court stated the applicable rule as follows: "The general rule is that it is the duty of the plaintiff to see that his case is brought up for trial within a reasonable time. While it is true that a defendant may, if he desires, call a case up for setting when it is at issue, he is not obliged to do so, and his failure does not excuse the plaintiff from the responsibility of seeing that the case is set for trial, under penalty of a dismissal. Clearly plaintiffs were responsible for the long delay."

The Price case also pointed out the prejudice to defendant in a case very similar to this by saying: "The next question is, were the substantial rights of the defendants prejudiced by the delay? Their counsel set up in their brief many reasons why this is so, but we think we need consider only one. If the case had been properly urged for trial by plaintiffs, it would in the ordinary course of affairs have been heard and determined some time in the year 1935. At that time the liability of defendants, if any, would have been definitely fixed and they could have acted accordingly. If, however, plaintiffs may now proceed with the action and recover therein, defendants may be required to pay between four and five years' rent which they would not have been liable for had the matter been determined within a reasonable time. Plaintiffs say the rent of the premises was reasonably worth $100 per month. If that be true, the delay in trial, assuming that plaintiffs recovered on their complaint, would cost the defendants at least four or five thousand dollars more than they would have been compelled to pay had the case been tried with reasonable promptitude."

Plaintiff Sanborn is endeavoring according to his petition filed on January 25, 1957, to recover $500 per year rental since September, 1937.

In Sanborn v. Lewis & Clark County, supra, this court discussed and determined the question of the deposit required of plaintiff Sanborn. The court stated: "Also it is contended that the rental value of the premises during the period of occupancy since the issuance of the tax deed should be deducted from the amount allowed. * * *

"* * * Respondents made proof of items totaling the larger sum of $2,698.75 as claimed. The findings do not show how the court arrived at the lesser sum of $711.86,

and it cannot be determined therefrom whether improvements required under the lease, or the rental value of the premises, were taken into account. There was no request for specific findings showing allowances and deductions made so as to reserve those questions for review, and we find nothing in the record, and upon the issues as made, which would justify this court in disturbing the finding of the trial court upon this point in the case." This proceeding is an attempt to relitigate that question at least in part by asserting an offset for rentals for the period of time considered by this court in that action.

The matter may not be permitted to slumber for more than 12 years during which time Johnstone occupied the premises and during which time the claim for rentals multiplied.

We realize that ordinarily whether an action should be dismissed for want of diligence in its prosecution is a question that rests in the discretion of the court. However, here there were no facts asserted that tend in any way to furnish an excuse for the delay and hence there was nothing to move the discretion of the court. True the motion was filed in June, 1944, and Sanborn asserts that he made frequent demand upon Johnstone for possession of the land, but this does not show an excuse for not bringing the motion on for hearing.

For the unconscionable delay by plaintiff Sanborn in bringing his motion on for hearing for more than 12 years after it was filed, it must be held that he is, and has been, guilty of such laches as to bar relief and the court was in error in not sustaining Johnstone's motion to dismiss the action. It should have granted the motion with prejudice.

It is contended by counsel for respondents that the re-

sult of this opinion is to take from Sanborn his property without due process of law since he is not a party to this proceeding, and has had no notice or opportunity to be heard. There is no merit in this contention. He was the party who sought and obtained the orders in respondent court that were brought here for review in this proceeding. His counsel in those proceedings are here endeavoring to uphold the action of respondent court.

"* * * due process in the appellate courts may consist of any proceeding in keeping with the general and established principles of judicial procedure." 16A C.J.S., Constitutional Law, §626, pp. 844, 847.

Our reports are replete with cases showing that the established procedure for special proceedings designed to review orders or judgments of the district courts is for the court to be named as defendant or respondent, and for counsel representing the party interested in upholding the order or judgment of the court to appear for the court though actually representing his client, the party interested in upholding the court's order or judgment.

The situation is comparable to cases involving appeals from orders or judgments. Notices of appeal and of subsequent proceedings go to counsel and not to the parties.

Our research has disclosed but one case where this same contention was made in a proceeding where the court and not the party interested was named as defendant or respondent, and it reached the same conclusion which we have. Morse v. District Court, 65 Nev. 275, 195 Pac. (2d) 199.

Counsel for respondents contend also that if this opinion stands, the question arises as to whether it may be pleaded as *res adjudicata* in another action brought by

Johnstone against Sanborn and which is pending in respondent court and which seeks to quiet title to the same lands.

We shall not undertake to dispose of that question here other than to state that whether this opinion may be pleaded or relied on as *res adjudicata* in that action does not affect our duty to decide the issues here presented as we see them.

Let a writ of prohibition issue prohibiting respondent court from further proceeding with cause No. 16386 other than to dismiss the same for want of diligent prosecution.

* * * *

Mr. Justice Adair:

I dissent and reserve right to file such dissent later.

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 9792

STATE OF MONTANA, ex rel
ALEXANDER B. JOHNSTONE, *Relator*

vs.

DISTRICT COURT, LEWIS & CLARK
COUNTY, et. al., *Respondents.*

PETITION FOR REHEARING

Comes now the respondent and moves this Court for a rehearing of said cause upon the following grounds and for the following reasons, to-wit:

That this Honorable Court has overlooked controlling facts in arriving at its decision.

That this Court has overlooked controlling statutes and decisions not previously invited to the attention of this Court.

That the effect of this judgment and decision as pronounced by this Honorable Court on the 24th day of June, 1957, results in the taking of private property without due process of law as guaranteed by subdivision 1 of the Fourteenth Amendment to the Constitution of the United States and Section 25 of Article III of the Constitution of the State of Montana.

Dated this 2nd day of July, 1957.

CHAS. N. DAVIDSON,
RALPH J. ANDERSON,
STANLEY P. SORENSON.

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 9792

STATE OF MONTANA, ex. rel.,
ALEXANDER B. JOHNSTONE, *Relator,*

vs.

DISTRICT COURT, LEWIS &
CLARK COUNTY, et. al., *Respondents.*

ORDER

Respondents' petition for rehearing herein is hereby denied.

Done this 3rd day of December, 1957.

JAMES T. HARRISON,
Chief Justice,
WESLEY CASTLES,
ALBERT H. ANGSTMAN,
Associate Justices.

Filed Dec. 4, 1957.
Edna J. Hinman, *Clerk of Supreme Court,*
State of Montana

APPLICATION OF RELATOR

I.

That during the years 1930 to 1935, inclusive, Bruce W. Sanborn was the owner of certain lands and real estate situated in the northern part of Lewis and Clark County, Montana, and including the following, to-wit:

> All of Section Two (2); the Southeast Quarter (SE ¼) of Section Three (3; the Northwest Quarter

NW)¼; North Half of the Northeast Quarter (N½NE¼) and the West Half of the Southwest Quarter (W¼SW½) of Section Eleven (11) all in Township Nineteen (19) North, Range Five (5) West;

And that during said years of 1930 to 1935 said Bruce W. Sanborn failed and neglected to pay the taxes upon said property and premises, or any thereof; and, as result of such default and delinquency in the payment of said taxes, the County of Lewis and Clark, Montana, did, on the 31st day of December, 1935, take a tax deed to said property and premises and all thereof, under and by virtue of which the title to said property and premises and all thereof was transferred and conveyed unto said Lewis and Clark County; that subsequently, and on or about the 26th day of February, 1936, the relator, Alexander B. Johnstone, entered into a contract with said Lewis and Clark County for the purchase of said above described property and premises and all thereof, a copy of said contract being hereto attached marked Exhibit "A" and by this reference made a part hereof; and that under and by virtue of said contract the said relator, Alexander B. Johnstone, did then and there enter into and upon possession of said above described property and premises and all thereof; and that ever since said time, and up to the present date, said relator has continued in sole and exclusive possession of said property and premises and all thereof; and ever since said time and up to the present date the record title to said premises has been in your petitioner, Alexander B. Johnstone, according to the records of Lewis and Clark County, Montana, and said premises have been listed and carried on the records of the County Assessor of Lewis and Clark County, Montana, in the name of your petitioner and all taxes, state and local, have been, during all of said

time, assessed, levied and charged against said premises in the name of your petitioner; and petitioner has paid all taxes levied or assessed upon or against the same for the entire period from the date of said aforementioned contract of purchase up to the present time.

That thereafter, on or about May 11, 1940, (and during the pendency of the litigation hereinafter mentioned) said relator, Alexander B. Johnstone, completed payment of the full purchase price as specified in said contract (Exhibit "A" hereto attached) and thereupon a deed was duly executed and delivered to him by said Lewis and Clark County, conveying full and absolute legal title to the above described property and premises, and all thereof, to said Alexander B. Johnstone; and that ever since said time he, said Alexander B. Johnstone, has been, and still is, the legal owner of said property, and all thereof; and that during all of said times and ever since the 26th day of February, 1936, said relator, Alexander B. Johnstone, has been, and still is, in open, notorious, sole and exclusive possession of said property and all thereof; and that during all of said time, (February, 1936, to date hereof; said relator, Alexander B. Johnstone, has paid all state, county or local taxes that have been levied or assessed upon or against said property, and all thereof. (Paragraph No. 1 of Respondent's Return).

I.

Answering paragraph numbered I of said petition, respondents admit that portion thereof commencing with Line 18 on page 1 of said petition to the semi-colon on Line 3 of page 2 of said petition; admit that the relator, Alexander B. Johnstone, entered into a contract with Lewis and Clark County for the purchase of the above described property and premises; allege that they have no knowl-

edge or information sufficient to form a belief as to whether or not Exhibit "A" attached to the said petition is a true and correct copy of said contract and therefore deny the said allegation; deny that Alexander B. Johnstone entered into and upon possession of the property described in said petition under and by virtue of said contract and in this connection allege that the petitioner, Alexander B. Johnstone, had been in possession of said property since on or about the 4th day of April, 1933, as lessee under a lease wherein the owner of said property, Bruce W. Sanborn, was lessor, which said lease was for a term of six years; admit that ever since said time, the said Alexander B. Johnstone has continued in sole and exclusive possession of said property and in this connection allege that the said Bruce W. Sanborn, the owner of said property has made frequent demand upon the said Alexander B. Johnstone for possession thereof as hereinafter alleged but that said Alexander B. Johnstone has failed and refused to surrender possession of said property to the said Bruce W. Sanborn. Deny that respondents have any knowledge or information sufficient to form a belief as to the truth of the allegation that ever since said time and up to the present date the record title to said premises has been in the petitioner, Alexander B. Johnstone, according to the records of Lewis and Clark County, Montana, and that said premises have been listed and carried on the records of the County Assessor of Lewis and Clark County, Montana, in the name of the petitioner and that all taxes, state and local, have been during all of said time assessed, levied and charged against said premises in the name of petitioner and therefore deny the said allegations. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegation that petitioner has paid all taxes levied or assessed upon or against the same for the entire period

from the date of said contract up to the present time and therefore deny the said allegation and in this connection respondents allege that if said relator has, in fact, made further payments of taxes since the date of the decision of this Court hereinafter mentioned and mentioned in paragraph VI at page 5 of said petition that petitioner made such payments with full knowledge of the rights, claims and demands of the said Bruce W. Sanborn and that such payment of taxes has been without any right and that as to such payments the petitioner is a volunteer.

Deny that respondents have any knowledge or information sufficient to form a belief as to the truth of the allegation that on or about May 11, 1940, (and during the pendency of the litigation thereinafter in said petition mentioned) the relator, Alexander B. Johnstone completed payment of the full purchase price as specified in said contract (Exhibit "A" attached to said petition) and thereupon a deed was duly executed and delivered to him by said Lewis and Clark County conveying full and absolute legal title to the above described property and premises and all thereof to said Alexander B. Johnstone and therefore deny the said allegation and in this connection respondents allege that if such a deed was in fact executed and delivered to the relator by said Lewis and Clark County the said deed is and was void and of no force or effect and conveyed no title whatsoever by reason of the facts hereinafter alleged. Deny the allegation that ever since said time the said Alexander B. Johnstone has been and still is the legal owner of said property and all thereof and in this connection respondents allege that said Bruce W. Sanborn is now and at all times mentioned in said petition and herein was the legal owner of said property and all thereof. Deny that during all of said times and ever since the 26th day of February, 1936, the relator, Alexander B.

Johnstone, has been and still is in open, notorious, sole and exclusive possession of said property and all thereof. Deny that respondents have any knowledge or information sufficient to form a belief as to the truth of the allegation that during all of said time (Feb. 1936, to date) said relator has paid to said county the local taxes levied or assessed upon or against said property and all thereof and therefore deny the said allegation.

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 9792

STATE OF MONTANA, on the relation of
ALEXANDER B. JOHNSTONE, *Relator,*

vs.

THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUTNY OF LEWIS AND CLARK, THE HONORABLE VICTOR H. FALL, once presiding Judge, and THE HONORABLE LESTER H. LOBLE, now presiding Judge, *Respondents.*

Filed Dec. 10, 1957.
Edna J. Hinman, *Clerk of Supreme Court,*
State of Montana.

ORDER GRANTING PEREMPTORY WRIT OF PROHIBITION

WHEREAS, upon the verified application of the above named relator, this Supreme Court has heretofore issued an order to show cause why an appropriate writ should not be issued to prohibit respondents from further proceedings in the Distrit Court of the First Judicial District of the State of Montana, In and for the County of Lewis and Clark in Cause No. 16386 therein, except to enter judgment quieting title in favor of relator, or dismissing said Cause No. 16386; and

WHEREAS, pursuant to the aforesaid verified application and upon the hearing and re-hearing, of said order

to show cause so issued in the above entitled matter, it appearing to this Supreme Court that the responding court should be prohibited from further proceeding with Cause No. 16386, other than to dismiss the same for want of diligent prosecution;

IT IS HEREBY ORDERED that a peremptory writ of prohibition in due form of law be issued out of and under the seal of this Supreme Court, addressed to the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, and to the Honorable Lester H. Loble, the now presiding Judge, and to the Honorable Victor H. Fall, once presiding Judge, commanding that the said respondents be prohibited and desist from any further proceedings in Cause No. 16386, other than to dismiss the same as hereinafter provided; and,

IT IS FURTHER ORDERED that the said writ command that the now presiding Judge in said Cause No. 16386 of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, enter judgment in said Cause dismissing the same for want of diligent prosecution.

Done this 10th day of December, 1957.

JAMES T. HARRISON,
Chief Justice,
WESLEY CASTLES,
ALBERT H. ANGSTMAN,
Associate Justices.

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 823

VICTOR H. FALL, one of the Presiding Judges of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, and BRUCE W. SANBORN,

Petitioners,

vs.

ALEXANDER B. JOHNSTONE,

Respondent.

Brief in Opposition

TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

The respondent, above named, opposes and resists the granting of Writ of Ceritorari herein and does hereby respectfully submit his Brief in Opposition to the Petition on file herein.

JURISDICTION

The petition on file herein states that the jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1257, Subdivision 3. (Pet. page 2).

Respondent disputes that the jurisdiction of the Court has been so invoked. This by reason of deficiency of any proper party petitioner.

PARTIES

HON. VICTOR H. FALL NOT A PROPER PETITIONER

The petitioner named as "Victor H. Fall; one of the Presiding Judges of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clark" in so petitioning this Court was acting *ultra vires*.

On the 16th day of February, 1958, an affidavit of disqualification was filed in Cause No. 16386 in the said District Court. This was the original quiet title action outlined on page 6 hereof. Certified copies of this disqualifiying affidavit have been filed with this Honorable Court. The same is set forth in full in Appendix hereto, page 5. The legal effect of filing of this affidavit was to render Judge Fall "without authority to act further in any action, motion, or proceeding" except for setting of

trial calendars or transferring the cause to another court or judge. Sec. 93-901, Revised Codes of Montana, 1947. (Appendix, page 1).

Not only was Judge Fall disqualified and without authority to act in the said Cause No. 16386, but also in all matters connected therewith. *Stefonick v. District Court*, 117 Mont. 86, 157 Pac. (2d) 96.

Victor H. Fall, as District Judge therefor had no authority to petition this Court for ceritorari. His execution thereof was void as being *ultra vires.*

Further, Judge Fall, by reason of his disqualification, is not a proper party petitioner herein. Having been so disqualified from acting and not presiding in said Cause No. 16386, the Writ of the Supreme Court of Montana had no effect as to him. He could not act on the matter, as a matter of jurisdiction, whether or not the said Writ issued. If a party to a suit is in no manner affected by what is decreed, he cannot be said to be a party to the decree and, therefore, is not a proper petitioner for review of the decree. *Farmers Loan and T. Co., v. Watermen*, 160 U. S. 265, 1 S. Ct. 131, 27 L. Ed. 115.

As shown by the decision of the Montana Supreme Court (Pet. p. 1), and the Order issued pursuant thereto, (Pet. p. 19), the presiding Judge in said Cause No. 16386 was the Hon. Lester Loble, who is *not* a petitioner herein.

BRUCE W. SANBORN NOT A PROPER PARTY PETITIONER

The petition herein states that "Sanborn here having the right to intervene is properly a petitioner in this proceeding." (Pet. p. 5-6). There is then cited in support of that proposition the case of *U. S. v. Terminal R. Association,* 236 U. S. 194, 199.

The petitioner's statement is without merit. His citation is inapplicable. The *Terminal* case was an appeal in which the jurisdiction of the Court was *invoked* by proper parties and *after* such invoking of jurisdiction a petition to *intervene* was granted. Respondent here does not agree that the right to intervene necessarily confers the right to initiate the proceedings. Obviously the *Terminal* case does not so hold.

AWrit of Ceritorari will not be granted on application of one not a party to the record. Re *Leaf Tobacco Board of Trade,* 222 U. S. 32 S. Ct. 833, 56 L. Ed. 323.

It should be noted that Sanborn, is here attempting to initiate proceedings which can only be initiated by a party below. He is complaining that he *was not* a party below, Surely, under the applicable law, it promotes rather than defies logic to state that if Sanborn was *not* a party below he cannot herein petition for the Writ: if he *was* a party below, his petition is without merit: in either case, the Writ should be denied.

QUESTIONS PRESENTED

This Respondent does not believe that the questions presented are clearly, accurately or fully stated. The Respondent respectfully urges that the questions presented are as follows:

1. Whether a Supreme Court of a State takes a person's real property and thereby violates the Constitutional requirement of due process of law by entering a decree ordering a lower Court to dismiss a quiet title action as to that property, on the ground that the plaintiff in such action is guilty of laches having failed to diligently prosecute said action where such decree is made and entered in special proceedings to which the said plaintiff was not made a party *but where the counsel for the plaintiff appeared, argued and participated on plaintiff's behalf* in accordance with the established practice and procedure of the State's Judicial system.

2. Whether the Supreme Court of a State violates the Constitutional requirements of due process of law by not hearing evidence on alleged issues of fact which alleged issues of fact have no bearing on the question of laches upon which question the said State Supreme Court ultimately decided the cause.

STATEMENT

While much of the material set forth in Petitioners' "Statement" is accurate, much of it is not. The Statement, furthermore, is misleading and not complete. Far from

being factual, the statement contains legal conclusions which Respondent denies and opposes. The Respondent, therefore, respectfully re-states this statement of this cause:

The petitioner Sanborn on the 23rd day of December, 1936, instituted and filed action No. 16386 in the District Court of the First Judicial District of the State of Montana to quiet title to real property, naming Johnstone as a party defendant and seeking to set aside a tax deed to Johnstone. The attorney appearing for Sanborn was Charles Davidson. This action was tried and a judgment rendered in the lower Court quieting the title in Johnstone, respondent herein.

An appeal was perfected to the Supreme Court of Montana and the judgment reversed, 113 Mont. 1, 120 Pac. (2d) 567. The Supreme Court of Montana required that the deposit in the sum of $1,213.41 to reimburse taxes paid, be delivered to Johnstone and made no further order. The remittitur in that case was filed on April 17, 1942. Thereafter, on the 23rd day of May, 1944, the then Judge of the District Court of the First Judicial District of Montana, after filing of the remittitur and, (it is granted) without any notice to the petitioner Sanborn, proceeded to enter an order on the application of the respondent herein requiring the petitioner Sanborn to deposit $2,041.29 as payment for additional taxes which had been paid by Johnstone pending Cause No. 16386, according to the County Tax records and gave the petitioner Sanborn the right to deposit such amount on or before June 20, 1944,

otherwise a judgment would be entered quieting the title to the lands and premises in Johnstone, respondent herein.

This order of May 23, 1944, was made under the provisions of Section 2214 the Revised Codes of Montana, 1935 (now R.C.M. 1947, §83-4158,) (Appendix, page 2).

That thereafter on June 8, 1944, the petitioner Sanborn filed in said District Court a petition to vacate the order for a deposit of the additional funds in the sum of $2,041.29.

No further proceedings were then had for approximately 10 years.

The respondent Johnstone, on November 23, 1954, filed a motion to dismiss the action on grounds of laches, the case then being 18 years old.

No further proceedings were had in the District Court of Lewis and Clark County until an amended petition was filed January 11, 1957, by Sanborn, seeking the vacation of the order for an additional deposit.

All of said motions and petitions came on for hearing before Judge Fall who, on the 11th day of January, 1957, set aside the order of the District Court made on the 25th day of May, 1944, as being without jurisdiction, and overruled the Motion to Dismiss. There appeared on behalf of petitioner Sanlborn, attorney Charles N. Davidson, Ralph J. Anderson and Stanley P. Sorenson.

Judge Fall was thereafter, on the 15th day of February

1957, disqualified by affidavit (Appendix 5) from proceeding further in the cause, under R.C.M. 1947 §93-901 (Appendix 1).

The respondent here, Johnstone on March 2, 1957, filed a petition with the Supreme Court of the State of Montana, seeking an appropriate writ to annul the orders made by the District Court on January 11, 1957, and to prohibit said Court from further proceeding in District Court Cause No. 16386 except to enter judgment quieting title in favor of Johnstone or to dismiss the action. In accordance with the established and customary procedure of Montana's Judicial System, an appearance on behalf of the respondent Court, was made and entered by Messrs. Davidson, Anderson and Sorenson as attorneys for Sanborn, the interested party.

Thereupon the cause was heard by the State Supreme Court on March 20, 1957.

No evidence was received in these proceedings in the Supreme Court of the State of Montana, that Court ruling that no material questions of fact had been presented and that the legal questions were solvable on the record as made and on the uncontroverted facts (see Pet. Appendix, p. 3).

On the 24th day of June, 1957, the Supreme Court of the State of Montana first announced its decision in favor of this Respondent (Petitioner below).

Petition for re-hearing was then filed on the 2nd day

of July, 1957. This is the petition which is set forth on page 12 of the appendix of the petition herein.

This Petition for re-hearing by the Montana Supreme Court was *granted* and the cause was re-heard on the 10th day of September, 1957.

The final decision was then announced, on November 17, 1957, as set forth in the Petition herein (appendix, p. 1).

Petition for Re-hearing was then filed in November, 1957, and this petition was the one denied by the State Supreme Court as shown on page 13, appendix, of the Petition herein.

ARGUMENT

This Petition for Writ of Ceritorari should be dismissed upon the following grounds and for the following reasons:

1. The jurisdiction of the Supreme Court of the United States has not been invoked by reason of lack of proper parties petitioner as heretofore pointed out.

2. There are no proper parties petitioner before the Court.

3. The Petition has not been prepared in accordance with the rules of this Court, and especially Rule 23, Rev. Rules of the Supreme Court of the United States, Title 28 U. S. C. A p. 15, 1957, pocket part, in that:

(a) Neither the Montana Statutes nor the article of the Montana Constitution referred on pages 2 and 5 of the Petition are set forth verbatim, as required by the rules:

(b) The Petition is misleading, ambiguous and inaccurate throughout, and fails to present petitioners case with accuracy and clearness as required by Rule 23 (4).

3. The matter which the petitioners want this Court to review was decided correctly by the Supreme Court of the State of Montana, in the administration of the judicial system of the State of Montana. The question was presented to that Court for the first time on a Petition for Re-hearing and that Court then promulgated a new decision saying:

"It is contended by counsel for respondents that the result of this opinion is to take from Sanborn his property without due process of law since he is not a party to this proceeding, and has had no notice or opportunity to be heard. There is no merit in this contention. He was the party who sought and obtained the orders in respondent court that were brought here for review in this proceeding. His counsel in those proceedings are here endeavoring to uphold the action of respondent court.

* * * Due process in the appellate courts may consist of any proceeding in keeping with the general and established principles of judicial procedure." 16 C.J.S., Constitutional Law, §626, pp. 844, 847.

"Our reports are replete with cases showing that the established procedure for special proceedings de-

signed to review orders or judgments of the district courts is for the court to be named as defendant or respondent, and for counsel representing the party interested in upholding the order or judgment of the court to appear for the court though actually representing his client, the party interested in upholding the court's order or judgment.

The situation is comparable to cases involving appeals from orders or judgments. Notices of appeal and of subsequent proceedings go to the counsel and not to the parties.

Our research has disclosed but one case where this same contention was made in a proceeding where the court and not the party interested was named as defendant or respondent, and it reached the same conclusion which we have." *Morse v. District Court*, 65 Nev. 275, 195 Pac. (2d) 199 (Pet. p. 9, 10).

4. The petitioner Sanborn is pursuing the wrong remedy. The petition herein shows on its face that *there was no taking* of property by the Montana Supreme Court Decision. There was only a dismissal of an action. In so far as it appears from the Petition, the Petitioner can commence a new proceeding in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, it being the county wherein the lands are situated. There is nothing to indicate, in the Petition on file herein, that the petitioner in any way was deprived of his property or any claim to property, by reason of the decision of the Supreme Court of the State of Montana.

5. It appears on the face of the Petition that either one of two situations existed in the proceedings in the Supreme Court in the State of Montana. Either Mr. Sanborn *did* appear by counsel, in the proceedings in that Supreme Court; or, the question of due process was not properly raised in the proceedings below. Either situation is fatal to the relief he petitions for here. For, if Mr. Sanborn was not participating in the Montana Supreme Court proceedings, *who can be said to have raised the question of due process, as stated in the Petition for Re-hearing?* (Pet. Appendix, page 12). Even if some property had been taken by virtue of the Montana Supreme Court proceedings, surely the respondent District Court and the Respondent District Judges, had no cause to complain that they were denied due process. The truth of the matter, as exemplified by the face of Petitioner's brief herein, is that Petitioner Sanborn was very much active, through counsel, in arguing and presenting *his* position before the Supreme Court of the State of Montana, and that to state before this Supreme Court of the United States, at this time, that Sanborn did not appear and participate in those proceedings, borders upon the frivolous, the frivolity appearing from the petition herein.

PETITIONERS' AUTHORITIES

The following cases have been cited by the Petitioners, and each involved an "in personam" action and not an "in rem" action, which was the basis of the proceedings here. They are further distinguishable as noted below:

In *Clark v. Wells*, 203 U. S. 138, Wells sued Clark on a note in Helena, Montana. No service was had, as the defendant was in California. Wells attached some land of Clark, and Clark appeared specially saving the right to object to the jurisdiction of the District Court, and only for the purpose of removing the case to the Fderal Court. The case was removed to Federal Court and thereafter service was attempted by publication. Clark again appeared specially challenging the jurisdiction of the court to render a judgment in personam. The Federal Court rendered a judgment for the plaintiff against Clark personally and said the judgment was collectible from the lands attached. The Supreme Court of the United States ruled that the personal judgment was ineffectual *but that the judgment as to the property involved was valid.* This court then used the following most interesting and applicable language:

> "The defendant it is true had not been personally served with process or submitted his person to the jurisdiction of either the State or Federal Court. But he did not attack the validity of the attack proceedings which appear to be regular and in conformity to the law of the State. There was no necessity of publication of notice in the Federal Court in order to warn the defendant of the proceeding; he knew of it and to a qualified extent appeared in it."

The case clearly supports Respondent's contention here, not the Petitioners'.

In Baltimore & Ohio Ry. Co. v. United States, 298 U. S. 349 80 L. Ed. 1213, the matter involved was an appeal from an order of the U. S. District Court dismissing a suit to set aside an order of the Interstate Commerce Commission relating to the division among participating carriers of rates on Florida citrus fruits. The action does not even remotely resemble the case at bar.

In the *Baltimore & Ohio* case, supra, the Supreme Court ruled that where a party invokes the just compensation clause of the Constitution, he is entitled to judicial determination of the amount due him, including the right to introduce evidence as to just compensation. But the case is not applicable here. Here, the Montana Supreme Court determined the issue of whether a cause should be dismissed on grounds of laches and determined that issue on the pleadings. As pointed out by that Court, there were no facts asserted that tended in any way to furnish the excuse for the delay. On the point of laches, no issue was ever made by the pleadings. Hence the taking of evidence was not required. *Risking repetition, the subject decision of the Montana Supreme Court took no property from Petitioner here. It dismissed his cause because he failed to diligently prosecute it.* The *Baltimore & Ohio* case, supra, is therefore, inapplicable.

In *Mullane v. Central Hanover, etc.,* 339 U. S. 306, 94 L. Ed. 865, the Supreme Court considered the question of whether the State Statute providing for notice to trus-

tees whose interests and addresses were unknown, violated the due process clause.

But, in the *Mullane* case, there was *not* involved, as here, a situation where a party, now claiming lack of due process *had appeared, argued* and contested the relief sought through counsel; his actual appearance being as practicable and efficient as in any cause at law, though he was not formally named in the proceedings. The *Mullane* case is not in point.

In *Covey v. Town of Sommers,* 351 U. S. 141, the town foreclosed a mortgage against real property of an incompetent woman. The United States Supreme Court held that statutory notice given to an incompetent denied due process when the town knew that the woman was incompetent. The case has not the remotest bearing on the issues presented by the petition here.

CONCLUSION

It is respectfully submitted that the petition for Writ of Certiorari, heretofore filed herein, should be denied.

Respectfully submitted,

FLOYD O. SMALL,
CLAYTON O. HERRON,
Galen Block
Helena, Montana
of Counsel

MYLES J. THOMAS,
Power Block,
Helena, Montana

APPENDIX

MONTANA STATUTES CITED BY RESPONDENT

The Revised Codes of Montana, 1947

Section 93-901 provides in pertinent part as follows:

"When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge. Such affidavit may be made by any party to an action, motion, or proceeding, personally, or by his attorney or agent, and shall be filed with the clerk of the district court in which the same may be pending at least five days before the day appointed or fixed for the hearing or trial of any such action, motion, or proceeding (providing such party shall have had notice of the hearing of such action, motion, or proceeding for at least the period of five days and in case he shall not have had notice for such length of time, he shall file such affidavit immediately upon receiving such notice). Upon the filing of the affidavit, the judge as to whom said disqualification is averred shall be without authority to act further in the action, motion or proceeding, but the provisions of this section do not apply to the arrangement of the calendar, the regulation of the order of business, the power of transferring the action or proceeding to some other court, nor to the power of calling in another district judge to sit and act in such action or proceeding, providing that no judge shall so arrange the calendar as to defeat the purposes of this section."

Section 83-4158 provides in pertinent part as follows:

"In any action now pending, or hereafter brought to set aside or annul any tax deed, or to quiet title, or to determine the rights of such purchaser, including the county, or his successors, to real property claimed to have been acquired by reason of tax proceedings or a tax sale, the purchaser or his successor upon filing an affidavit may obtain from the court an order directed to the person claiming to own the property, or to have any interest in or lien upon said property, or a right to redeem the same, or claiming rights hostile to the tax title (which said person is herein for convenince, called the true owner), commanding him to deposit in court, to the use of the tax purchaser or his successors, the amount of off taxes, interest and penalties which would have accrued if said property had been regularly and legally assessed and taxed as the property of said true owner and sold for delinquent taxes and was about to be redeemed by him, and the amount of all sums reasonably paid thereafter by said purchaser or his successors after three (3) years from the date of said tax sale in preserving said property or in making improvements thereon while in possession thereof, as the total amount of said taxes, interest, penalties and improvements is alleged by the plaintiff and shall appear in said order, or to show cause on a date to be fixed in said order, not exceeding thirty (30) days from the date thereof, why such payments should not be made. Said affidavit shall set forth the place of residence of said true owners and whether they are in the State of Montana, if known to the plaintiff, or that the same is not known to the plaintiff

. . . . If such amount, when so determined, shall not be paid within the time fixed by said court, then said true owner shall be deemed to have waived any defects in the tax proceedings and any right of redemption, and thereupon, irrespective of any irregularities, defects or omissions or total failure to observe any of the provisions of the statutes of Montana regarding the assessment, levying of taxes, or sale of property for taxes, and the giving of notices, including notices of redemption, or concerning tax deeds, whether or not such omissions or failures make said proceedings void (other than that the taxes were not delinquent or have been paid), the title of such true owner shall not be quiet as against said purchaser or his successors, and a decree shall be entered in said action quieting the title of said purchaser or his successor as against said true owner.

. . . . *In the final judgment the court shall also determine the rights growing out of any additional taxes on said property accruing or being paid by either party during the pendency of said suit, and, in said suit, the court shall have complete jurisdiction to fix the amount of taxes which should have been paid and to determine all questions necessary in granting full relief, including the power, in appropriate cases to order any assessor or other tax officer to make and certify to the court a corrected or new assessment or to do any other act or thing necessary to enable the court to do complete justice in the premises. Errors may be reviewed on appeal from the final judgment.*" (Emphasis supplied).

MONTANA STATUTES CITED BY PETITIONERS

The following are the sections of the Revised Codes of the State of Montana, cited by Petitioners, (Pet. page 5) but which Petitioners failed to set forth in accordance with the Rules:

Section 93-9106 states in pertinent part as follows:

> "The adverse party may answer under oath. On the return of the alternative Writ of Prohibition or Mandate, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer, under oath, made in the same manner as an answer to a complaint in a civil action."

Section 93-9107 states in pertinent part as follows:

> "If an answer be made, ***which raises a question as to a matter of fact essential to the determination of the motion,*** and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court or judge may, ***in its or his discretion,*** order the question to be tried before a jury, and postpone the argument until such trial can be had. The question to be tried must be distinctly stated in the order for trial." (Emphasis supplied).

Section 93-9202 states in pertinent part as follows:

> ***"Where and when issued.*** The same Writ of Prohibition may be issued by the supreme court or the district court, or any district judge, to any inferior

tribunal, or to a corporation, board, or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit on the application of the person beneficially interested."

AFFIDAVIT OF DISQUALIFICATION

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

BRUCE W. SANBORN,
Plaintiff,

vs.

LEWIS & CLARK COUNTY, a body politic and corporate; ALEXANDER B. JOHNSTONE, and _____ JOHNSTONE, his wife, otherwise known as Mrs. ALEXANDER B. JOHNSTONE,
Defendants.

No. 16386
AFFIDAVIT OF DISQUALIFICATION

COUNTY OF LEWIS & CLARK } ss.
STATE OF MONTANA }

CLAYTON R. HERRON, being first duly sworn on oath deposes and says:

That he is an attorney for the above named defendant, Alexander B. Johnstone, and as such attorney makes this affidavit for and on behalf of said defendant; that affiant has reason to believe and does believe that said defendant cannot have a fair and impartial hearing or trial before

the Honorable Victor H. Fall, District Judge of the First Judicial District of the State of Montana, who is the presiding Judge in this cause, by reason of the bias and prejudice of said Judge Victor H. Fall, in said matter; and that affiant, as attorney for said defendant, Alexander B. Johnstone, now therefore makes and presents and files this affidavit for the purpose of disqualifying the said Judge Victor H. Fall, from acting or presiding in this case.

Dated this 15th day of February, 1957.

CLAYTON R. HERRON,

Subscribed and sworn to before me this 15th day of February, 1957.

FLOYD O. SMALL,
Notary Public for the State of Montana.
Residing at Helena, Montana. My commission expires Jan. 6, 1958.

(SEAL)